UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ITSERVE ALLIANCE, INC., ET AL.,	:	Docket Nos. CA 18-2350, 19,193; 19-287; 19-290; 19-292;
	:	19-294; 19-295; 19-296; 19-297;
Plaintiffs,	:	19-298; 19-299; 19-300; 19-302;
	:	19-390; 19-423; 19-539; 19-542;
vs.	:	19-543; 19-546; 19-551; 19-552;
	:	19-553; 19-555; 19-729; 19-730;
L. FRANCIS CISSNA	:	19-731; 19-732; 19-733; 19-734;
	:	19-786; 19-786; 19-828; 19-905;
Defendant.	:	19-871.

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Washington, D.C.
Thursday, May 9, 2019
10:05 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT SENIOR JUDGE

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P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Civil Actions 18-2350; 19-193, 19-287, 19-290, 19-292, 19-294, 19-295, 19-296, 19-297, 19-298, 19-299, 19-300, 19-302, 19-390, 19-423, 19-539, 19-542, 19-543, 19-546, 19-551, 19-552, 19-553, 19-555, 19-729, 19-730, 19-731, 19-732, 19-733, 19-734, 19-786, 19-828, 19-905, and 19-871.

ITServe Alliance Incorporated, et al. versus L. Francis Cissna, et al. For the plaintiffs, Jonathan Wasden and Bradley Banias. For the defense, Aaron Goldsmith and Kathleen Angustia, agency counsel.

THE COURT: Wow, am I a lucky duck. I am Judge Rosemary Collyer, and I am the judge who has been assigned this collection of cases to decide some of the preliminary legal issues. Many of the underlying cases are mine and will never leave, but some of the others will eventually go back to other judges.

It just seemed more efficient and more timely if one judge dealt with the preliminary legal issues.

I have lots of briefs and cases to read and other things, and I will admit to the assembled group, it's something that the lawyers already know, which is that the briefs kind of crossed each other in the night as if they got filed at the same time and nobody knew what the other side was quite going to say, which means normally I come in fully prepared and I really have questions.

This time I actually, and now that I know you're all here it seems to me, because you probably have not read all the briefs, it makes sense to begin the way I was going to anyway, which is to ask the parties to make a short statement of their position at the beginning of their arguments so that we get that laid out clearly enough that I can then ask intelligent questions as they proceed.

We do have more than one motion. We have the government's partial Motion to Dismiss for lack of jurisdiction. Then we have the plaintiff's Motion for Summary Judgment, which is really summary judgment on the legal issues, not on the entire case, cases. And the government's opposition and Cross-Motion for Summary Judgment on the legal issues.

So who exactly should go first, I don't really know. It's kind of like, mmm, mmm, mmm, do you have a preference, have you discussed it, do you know?

MR. GOLDSMITH: We have not discussed it. We're prepared to go first if that's acceptable to Your Honor.

THE COURT: Okay.

MR. WASDEN: Your Honor, no preference either way. Although my understanding is that the motion to dismiss was stayed pending the outcome of this hearing. As the motion seeks to dismiss the trade association and is not applicable to the same arguments raised in the as applied challenges.

THE COURT: Right, it will just stay there.

MR. WASDEN: Yes, so I don't have a preference one way or the other, Your Honor.

THE COURT: All right, then why doesn't the government go first.

For those of you who aren't familiar with the courtroom, the plaintiff, the person -- it's a civil case. There's no crime involved here.

The plaintiff who brings the case always gets seated nearest to the jury box because the plaintiff bears the burden of proof, in this case beyond a preponderance of the evidence. There isn't a jury because this is not a jury case. I get to decide these legal issues. Juries only decide facts, not legal issues. Excuse me for interrupting you, sir.

MR. GOLDSMITH: You didn't interrupt me.

THE COURT: Are you Mr. Goldsmith?

MR. GOLDSMITH: I am. May it please the Court. I represent the government, and I'd like to address, as you said, this matter comes before the Court on consolidated briefing on certain threshold legal issues. And I'd like to begin with the third issue that was identified in the order of consolidation the Statute of Limitations. And the reason I'd like to begin with it is it is a jurisdictional issue.

THE COURT: Well, it is a jurisdictional issue, but it is the clearest of the issues. So if you don't mind. I understand your argument on it. If you don't mind, I'd really

rather you spend your time on the other two matters because I understand about Statutes of Limitations. They're not nearly as unique to me as the rest of the case.

MR. GOLDSMITH: Okay. Of course, Your Honor, we can proceed however you'd like me to proceed.

THE COURT: Whichever of the other matters.

MR. GOLDSMITH: So let me start with the first issue. This is the regulation that addresses the use of the phrase "up to three years," and the parties disagree as to the meaning of this phrase as to whether or not USCIS has discretion to grant an H-1B visa petition for a period of less than three years.

So, for example, if an employer requests a validity period of three years and the agency reviews the evidence and determines that they only satisfy the requirements for one year may they grant it for one year, or is it an all or nothing proposition?

THE COURT: Well, let me ask you a question. I know that -- I'm sorry I'm interrupting. I told you I wouldn't and yet I am. I'm sorry, I can't help myself.

I know that you were distressed at the examples that the plaintiffs put in their briefs because these are legal issues and not specific cases. The examples are illuminating and so the question is, and I understand your argument about up to three years, and the plaintiffs are going have to respond, I assume from their briefs, that the tradition, the policy, the

practice has always been until recently, until 2018, that up to three years meant three years. If you applied for three years, you got three years.

MR. GOLDSMITH: We disagree with that, and we pointed to a case *Valorem Consulting*, I believe it was from January, I can't remember if it was 2014 or 2015, that predates the 2018 guidance memorandum. And that was a situation where someone applied for three years and they got one year.

THE COURT: Okay. And what was the basis for the one year limitation, do you remember?

MR. GOLDSMITH: Yes, *Valorem Consulting* was a case which the finding was that they only supplied sufficient evidence to show that the person was going to be working in a specialized occupation for one year. And there were a couple of issues in that case, but one of the issues that was decided on on Motion for Summary Judgment was whether or not the agency could grant for only one year. And the agency supplied evidence to show that it had been their practice to sometimes grant less than three years.

THE COURT: And what about granting one day?

MR. GOLDSMITH: Well, I mean, that's certainly not an unusual occurrence.

THE COURT: It's not unusual?

MR. GOLDSMITH: No, it is unusual.

THE COURT: I mean, isn't it -- it's as good as a

negative, isn't it?

MR. GOLDSMITH: I'm sorry?

THE COURT: It's as good as a denial?

MR. GOLDSMITH: There's little practical difference, I would agree with that.

THE COURT: So if I applied for three years and I got a one year visa, I would have a denial for two years and could appeal the denial for two years, right?

MR. GOLDSMITH: You could challenge it in federal court absolutely, Your Honor. We're not disputing that you can challenge, what we would refer to as a partial grant in federal court under the APA on the grounds that it's contrary to law, it's arbitrary and capricious, but that determination would be made based on the certified administrative record. The agency would provide the record and the judge would look at it and determine whether or not it was arbitrary and capricious contrary to law, et cetera.

THE COURT: Okay. So why don't you go to the employer/employee?

MR. GOLDSMITH: Yes, Your Honor. So that stems from the 1991 rule, and the question is really whether or not the agency, the issue before the Court today is whether or not the agency had the authority to promulgate this requirement back in 1991. At that time --

THE COURT: Well, that's sort of -- that's part of

the question. I agree with you.

So you can answer that part of the question. But it has many other parts, don't you think?

MR. GOLDSMITH: Well, I think that's the issue that's before the Court today. There is a question moving forward whether or not a particular decision, a particular determination by the agency is correct or not, but that would be --

THE COURT: But beyond that, the question also is whether the definition of employer is actually one that UCIS [sic], am I saying that right?

MR. GOLDSMITH: USCIS, yes.

THE COURT: USCIS, sorry, has the authority to interpret.

MR. GOLDSMITH: Correct, whether or not they have the authority to issue the regulation.

THE COURT: No, no, no, wait.

MR. GOLDSMITH: But whether or not also --

THE COURT: Issue the regulation is a 1991 question.

MR. GOLDSMITH: Correct.

THE COURT: Interpreted is a 2018 question.

MR. GOLDSMITH: I don't think I would agree with that, and let me try --

THE COURT: Well, I thought 1991 had an "or" in it?

MR. GOLDSMITH: It did.

THE COURT: And 2018 seems to ignore the "or" in the definition.

MR. GOLDSMITH: I would say that the 2018 refers back to the 2010 employer/employee memorandum, and it states that an adjudicator should look towards that 2010 memorandum that remains in effect in terms of determining whether or not the employer/employee relationship exists.

Now, that 2010 memorandum was challenged on the very basis you identified whether or not it was in conflict with the 1991 rule. And we pointed to a decision of U.S. District Court here in D.C., the *Broadgate* decision that analyzed that question and determined that it was not a legislative rule that was an interpretation of this earlier rule. And we would add, I don't want to get into the Statute of Limitations, but to the extent that you're challenging the 2010 rule, we would say that is barred by the Statute of Limitations.

THE COURT: Well, the 2010 rule still had "or" in it, didn't it? I mean, "or" is in the 1991 rule. The 2010 memo didn't change the rule.

MR. GOLDSMITH: It did not.

THE COURT: It did not. And so the rule contains "or"?

MR. GOLDSMITH: Correct.

THE COURT: Does the current practice, it does not seem to.

MR. GOLDSMITH: Our view is that it is absolutely the same. We're continuing to apply the 1991 rule.

THE COURT: Well, your view doesn't seem to accord with the facts.

MR. GOLDSMITH: Your Honor, if I could refer to exactly where in the memorandum I'm referring to.

THE COURT: Well, that would be very helpful, I appreciate it.

MR. GOLDSMITH: Okay. So I attached it to -- as an Exhibit 3 of our Motion for Summary Judgment. And what I said there on page 3, there's a footnote that says, "To determine whether an employer/employee relationship exists, adjudicators should see the employer/employee memorandum published on January 8th, 2010 for guidance."

So what they're saying is we're not redefining what's in the regulation. We're not changing the definition in the regulation, we're not changing the 2010 definition, we're simply telling adjudicators look to this earlier memorandum, it's what controls. It's what provides the guidance for how this rule should be applied and provides examples. And it lists, this is -- just to be clear, the 2010 employer/employee memorandum is sometime also referred to by courts as the Neufeld memorandum, it's the same document.

THE COURT: Right.

MR. GOLDSMITH: It lists, I think 11 factors that

adjudicators should consider.

So this is not intended to -- and it says on its face that it's not changing this, it's referring adjudicators back to this earlier --

THE COURT: Well, if it's not changing things, the question then becomes why are the results so different?

MR. GOLDSMITH: That's a fair question.

THE COURT: Good, I'm glad, thank you.

MR. GOLDSMITH: So there's a test for determining whether or not something is a legislative rule. And we're not writing on a blank slate, there's a body of case law from the D.C. Circuit that talks about when something is a legislative rule on one hand or interpretive rule of policy memorandum on the other hand.

And there was a series of cases that we cited, and basically -- and there's several factors, three primary factors that courts look to.

But the key point is you don't make that determination based on whether or not by looking at statistics and saying, well, are there more that are being denied, more being granted. Rather you look to see whether or not it is, in fact, an interpretation, because if it's an interpretation, there's no requirement to go through notice and conduct rule-making.

Now, that's not the end of the story, and you alluded to this at the beginning. There still has to be a determination

by a federal court, perhaps you alluded to perhaps another judge as to whether or not the agency is properly making a determination, right? So we're not saying there's no --

THE COURT: That's on a case-by-case basis.

MR. GOLDSMITH: Correct.

THE COURT: What I'm really trying to figure out is whether or not the 2018 memo, which you want to have me find to be an interpretive rule, actually changed things. So then let me ask you, other than issuing that memo, what instructions were given, what training was given, how many new people were hired who don't even know what you used to do before and have only read the 2018 memo? I mean --

MR. GOLDSMITH: Your Honor.

THE COURT: -- the answers are different, and so therefore there has to be something that has been interpreted in a different way. And I say interpreted giving you the benefit of interpreted as opposed to directed. But I don't know whether it's interpreted or directed, and so I don't know that this is a question of law that can be decided without some discovery. And so my question to you is, do you even know? I mean, I'm not sure, are you with Justice?

MR. GOLDSMITH: I am, Your Honor.

THE COURT: Okay, yeah. So you're not inside the agency?

MR. GOLDSMITH: Correct.

THE COURT: Right. So I don't know if you even know, and I'm not assuming that I can ask you very detailed questions about the underlying facts because that's not the legal argument that you're prepared to make. But the question that I have is whether there should be discovery of some of those underlying facts. What was the training, what was the explanation, what went along with the new memo? What went behind the new memo? Why was it issued in the first place? Who issued it? Who decided it? Did it come from within the agency or not?

Whose opinion was this that we're defending today? I don't know if you even know the answers to those questions, but I'm not sure that I can just, on the basis of the arguments, the arguments before me, decide whether or not it's legislative or interpretive. So there's a kettle of fish.

MR. GOLDSMITH: Okay. Well, I appreciate that, Your Honor.

THE COURT: Swimming at your feet.

MR. GOLDSMITH: So if you look again at the case law, as a general rule, policy memos, and it's an important section, as a general rule they're not subject to judicial review. What happens is courts review actual agency decisions, final agency decisions. This is the principle Supreme Court Lujan, but I also cited two cases, Arden *Woods* and *RCM* that talks about this.

Now, the important exception is if something -- if a policy memo kind of crosses the line and becomes a legislative review, and courts have articulated a couple of tests for determining that, a couple factors to look for, and I think what's important is this is really a legal determination according to, and I cited *Funeral Consumer Alliance*, *Center for Auto Safety* as examples of cases that look towards these factors to determine whether or not, whether or not the memo itself is a legislative rule. That is a term of art, and it is, it is -- we're not writing on a blank slate. We're looking towards this precedent to determine whether or not something constitutes a legislative rule.

And as I alluded to, this is not the end of the story. Right. It's just a question about whether or not this is a legislative rule, courts have had, and I cited two examples of tree (sic) that is have a jurisdictional threshold question because if it's not a legislative rule, then there's no final agency action for the Court to review. If it is a legislative rule, the remedy is clear. It didn't go through notice and comment rule-making; therefore, it should be invalidated by the Court.

But what these cases stand for, you don't look, you don't review kind of the process by which agencies makes decisions. You review final agency actions to determine whether or not they're contrary to law, et cetera. And that's a vital

function that courts play in our system.

THE COURT: Well, and I agree with your outline of the law. I mean, I've done enough administrative law over the course of the many years, and you hit right on, you're absolutely correct.

The question that I'm struggling with and that I don't know is clarified thoroughly in the briefs is the degree to which what is drafted to look like an interpretive rule was, in fact, a legislative rule, was a mandate, was backed up by direction that the point is this is bad.

Now, the plaintiffs say that this is an attack on their industry.

MR. GOLDSMITH: Right.

THE COURT: Of course, that's their position, that's why they've gathered together, that's why there's all these lawsuits. Whether that's true or not, I have no idea.

But you see, it doesn't sound happenstantial. That's the problem that I'm having. It doesn't sound like, oh, gee, we just issued an interpretation and we've brought everybody back to something that we've already said in 2010. Even though after 2010 it didn't seem to make much difference, but by George, what we said in 2018, go back and look at 2010, everybody said, oh, well, we really mean it this time. And so my goodness, you don't get anymore or you get very, very many fewer three year pieces in this particular industry.

That would be a legislative decision. If there were a concept, articulated concept that we're going to reduce the approval of visas in this industry because you can't satisfy our new rules, do you agree with me?

MR. GOLDSMITH: I don't because either the policy memo under D.C. case law constitutes legislative rule, in which case it should be invalidated, or it doesn't, in which case courts should review the decisions. If they find something --

THE COURT: So as long as it's opaque, then I can't ask.

MR. GOLDSMITH: I'm sorry?

THE COURT: As long as it is opaque, I can't say I need to know more facts before I can decide the nature of this memo.

MR. GOLDSMITH: Well, agencies can certainly change their minds, people can have different interpretations.

THE COURT: Of course, they can, of course, they can. You and I know that, I agree with you completely.

MR. GOLDSMITH: Right.

THE COURT: The problem is that what you're telling me is we're not changing our mind. We articulated what we think in 2010, 2018 nearly says the same thing as 2010, no big deal.

MR. GOLDSMITH: Well, just to be clear, obviously the agency expected adjudicators to read this guidance memorandum

and to follow it. So we're not, of course, it's an important document. We're not saying --

THE COURT: Yes.

MR. GOLDSMITH: -- we wrote it and we expect adjudicators to disregard it.

THE COURT: But as to the issue of who is the employer, you're saying, well, you just go back to the 2010 memorandum, and it lists all the relevant factors.

MR. GOLDSMITH: Well, I think the memorandum is significant for reasons -- for other reasons unrelated to the employer/employee requirement.

THE COURT: Okay.

MR. GOLDSMITH: Because this -- the 2010 guidance memorandum really didn't address the question of employer/employee. It provided examples, interpretation of, one, the itinerary requirement.

THE COURT: Yes.

MR. GOLDSMITH: And also examples of types of evidence that could be provided to satisfy the statutory and regulatory requirements. So if an agency changes its interpretation of a regulation that doesn't make it a legislative rule, it's still an interpretive rule.

Now, it might be an incorrect interpretation. I mean, there is case law on that just because something is an interpretive rule doesn't make it correct if it's an incorrect

interpretation. But that's not the issue. The issue under D.C. case law, and if I feel like -- I don't mean to belabor this point, there's three factors, under those three factors, is it the legislative rule? If the answer is no, then the next step is you review the individual determinations and courts can then, you know, vacate an agency decision, can explain why it's incorrect. Can get -- provide direction to the agency in remanding back to the agency to be re-adjudicated.

THE COURT: And we're going around, and forgive me for pressing you on this because I think we've been back and forth, and maybe I should just be quiet on it. And just consider your arguments and go from there.

My question to you is the -- you cited the 2010 memorandum for the 11 points that it contains to determine who's an employer and who's an employee, right?

MR. GOLDSMITH: Correct.

THE COURT: Right, okay. And then you told me that the 2018 memorandum on that point, who's an employer and who's an employee, really referenced everybody to go back and follow the 2010 memo.

MR. GOLDSMITH: Correct.

THE COURT: Because we really meant it.

MR. GOLDSMITH: Correct.

THE COURT: In essence. But the difference is stark between after 2010 and after 2018 as to whether somebody

constitutes an employer or not. And so my question is in determining whether 2018 is a legislative rule or an interpretive rule, am I really limited to what the 2018 memo says or do I have the right to say I don't understand how a 2018 memo that says to follow the 2010 memo should result in such differences unless there was more than the 2018 memo that gave instructions, unless there was training, unless there was direction of some kind beyond the memo itself.

And so my question to you is, under those circumstances am I allowed to ask those questions or is your answer actually no, Judge?

MR. GOLDSMITH: Respectfully, the answer is actually no, Judge, because --

THE COURT: That's okay.

MR. GOLDSMITH: -- of course an agency --

THE COURT: I'll take that, I'll take that.

MR. GOLDSMITH: Of course an agency trains its adjudicators, and hopefully it trains them well and they're following the regulations, they're following the law, but the training isn't subject to judicial review. What's subject to review is the final agency action.

THE COURT: Well, it might be except that if, in fact, the training is part of what really amounts to a legislative change and not an interpretive change, then -- then it could all be disrupted by a court.

You see, it's very unclear because the results are so different. And yes, of course, the agency adjudicators get trained, one would hope they get trained. But there doesn't seem to be training in the fact that the word "or" is a disjunctive, not an and, which is a conjunctive. There seems to be a big difference in those two, and I don't know where that is to be found because it's not really in the memo, and I can go back to the 1991 regulation and there's the "or" just as big as your face or my face, I'm sorry, didn't mean that as a personal statement. And so I'm not quite sure what I should do.

I understand your legal argument.

MR. GOLDSMITH: Could I have one more point, Your Honor?

THE COURT: Yes.

MR. GOLDSMITH: So it's not correct that the 2010 -- I'm sorry. The 2018 guidance memorandum, I'm getting mixed up here. It's not correct that it simply refers to the 2010 memorandum and doesn't do anything else. It's more than one sentence long, it includes other components saying, referring to other requirements specifically the itinerary requirement, it reminds adjudicators this itinerary requirement is a binding requirement. It's found in regulation, that regulation was promulgated through notice and comment rule-making. Adjudicators are not free to disregard it. If there were

adjudicators who were disregarding a requirement, then that is a significant problem, and the remedy is that they need to follow the requirements because as a general rule an agency is bound by its own regulations. There's no authority for it to disregard it. And so if there was a situation where they weren't following their regulations and now they are following the regulations, that's not a basis for invalidating the memorandum.

And I point particularly to page 6, there's a sub-header, "itinerary is a regulatory requirement." And it says, specifically reminds people that it is a requirement, there isn't an exemption from this requirement, and then it provides examples of evidence that can be used to satisfy this regulatory requirement.

THE COURT: Okay. So then you just switched gears, now we're off to the itinerary. I'll be happy to follow you to the itinerary because that's another aspect of the challenge here. And the question then becomes whether the nature of the change, and it definitely is a change, is really an interpretation or not. An itinerary being required would be an itinerary that might say that you're coming from a foreign country, I won't pick a country, a foreign country, you're coming into the United States to work in IT, which is a specialty area for which you have your education and training, and you're applying for a three-year visa and you're going to

work for one of the plaintiff's companies, they're going to pay you, they're going to pay your overtime, they're going to pay your benefits, they're going to watch your hours, and they're going to assign you to location X all in one city. That's my hypothesis for three years.

Now, is that enough?

MR. GOLDSMITH: Depends, I guess that's the answer lawyers always give. But it depends whether or not the person is going to be located in one location.

THE COURT: No, he's going to work for different employers, all in one city, but he's going to be employed by one of the plaintiff companies and contracted out to work for X and Y and Q and R, all within a metropolitan area.

MR. GOLDSMITH: But at different business locations.

THE COURT: Different business location. And I don't know who it will be in your three. I can tell you the reason that I'm bringing -- I'm now the employer, I've just changed positions, I'm no longer the applicant, I'm the employer. I'm hiring this person for three years because I have a growing business and I need this person for the first year for sure because I have six months work at such-and-such a place and six months work at such-and-such a place. I believe I have a follow on six months work somewhere else, and then three months work somewhere else. Beyond that I can't quite tell so I'm a year and three quarters into it. Beyond that I don't know, but

I'm a growing business. I'm sure there's going to be work. So I've applied for three years, he's going to work for me. I'm going to pay for him. I'm going to keep his salary, I'm going to pay his benefits. I'm going to make sure he gets his vacation, I'm going to do all that sort of stuff, and for the first six months this is where he's going to work, et cetera.

Now, as I understand your itinerary rules, that's insufficient because I cannot specify in the last three months of the second year or the third year where the foreign person is going to actually sit, stand or whatever for doing his job. And so you're going say, no, you didn't give me enough of an itinerary.

MR. GOLDSMITH: So whether there's enough of an itinerary to report the fact specific inquiry. But basically what you're saying is probably, that would probably not be sufficient. We cited a particular case dealing with the itinerary requirement, next generation where there was a question about whether or not it was sufficient, we thought it was insufficient. The District Court disagrees, this case is in the Southern District of New York.

And so you could imagine a situation where there is a difference of opinion as to whether or not the agency reasonably reached the conclusion it did.

THE COURT: But you're back to the same answer. You're back to the same answer that says no, you can't attack

this, you have to do it one by one by writing by one by one, you have to apply every year, the fact that it takes us a year to adjudicate what should take 30 days, and that's a different issue that I want you to address before you sit down.

MR. GOLDSMITH: Okay.

THE COURT: That it takes us a year to figure it out, and then we say no or we give you one day or we give you a year and a half and no more.

When I have a growing business, I know there's going to be work for this person, and attestation used to be enough. But no, you say now I need proof. Proof I need, not attestation, so isn't that a material change?

MR. GOLDSMITH: No, we cited from before is to predate the 2008 guidance memorandum that say you have to provide evidence. We specifically refer to a proposed 1998 ruling, the preamble that said this is a longstanding requirement. We cited other cases where, you know, people provide evidence and there's a question is the evidence sufficient to --

THE COURT: So your position as an agency, I'm speaking to you as a representative of the agency, the agency's position is the system is not broken, it is merely now finally being properly administered. We don't want those people in this country, is that what you're telling me?

MR. GOLDSMITH: Well, no, I'm not making --

THE COURT: Yes, you are. Yes, you are. I mean, how am I not supposed to think that? I mean, really, I'm so sorry, it has nothing to do with administrative law. But it does have to do with the proof of whether or not it's a legislative rule or an interpretive rule. And to continually say you have to do it one by one by one isn't a satisfactory response. It fits administrative law if your premises are all correct, and I don't disagree with your premises, I agree with you, you've got the law down better than the plaintiffs actually. You actually understand administrative law and so do I. But it may not work here. I just don't understand how you can give me administrative law 101 when there is such a difference in output.

MR. GOLDSMITH: Well, there's nothing inherently wrong with having different interpretation. We're going around in circles, and I don't mean to belabor this point.

THE COURT: All right, all right. So won't you tell me why you can last more than 30 days, take more than 30 days to decide.

MR. GOLDSMITH: Right. So the threshold issue is, you know, jurisdiction -- the courts can, you can certainly compel agency of action unlawfully withheld. There's case law on that, that if you're taking too long, you're unlawfully withholding something. Someone can file --

THE COURT: So you're going to send us back, each of

these employers back to individual lawsuits. Every single time. I mean, sir, that is not a satisfactory answer. You had better come up with something better than that. This is too generic a problem for the answer to be that anybody adversely affected has to file independent lawsuits. Lawsuits cost time and money.

The government does not have the strength of power to say to its citizenry, you must sue us each and every time. So now you give me a right answer, tell me why it is impossible for the agency to evaluate a labor certification and authorize a visa in 30 days or less?

MR. GOLDSMITH: Your Honor, I don't have an answer to that question.

THE COURT: Well, it's part of the lawsuit, why do you not know the answer to that question?

MR. GOLDSMITH: Because it wasn't one of the issue that was consolidated. I know that's a legalistic answer.

THE COURT: No, no, no, that's a fair answer, except it's a game. This entire -- I mean, I may end up ruling for you because I may find myself caught up in administrative law, but I will tell you that it is decidedly a game. We don't want those people here.

MR. GOLDSMITH: Your Honor, I want to thank you for sharing that concern. There's a number of agency counsel here. We'll discuss this, and I understand your point clearly.

I can't answer a question I don't have the answer to. Perhaps --

THE COURT: You cannot. So why don't I ask you, since I think it is fairly raised as one of the overarching legal issues of why it's now taking so long for these adjudications to proceed, why don't you file something with me that explains from the agency's perspective why that is and what the remedy is? And if the remedy is, as you suggest and this is what the agency wants you to say, then you have to say that the plaintiffs can sue each and every time. That may be the agency's position and you are the agency's lawyer and it's not -- I can't say it's illegal for them to take that position. It may be wrong, it may not be consistent with the law, but I can't say it's criminal. So you're entitled to express their opinion what they want you to say with your advice.

I would say, however, that this is very troubling, the plaintiffs may lose this case. I'm not saying that. I don't know that. I haven't decided that. But the whole thing is very troubling, and it's part and parcel. It would appear to be part and parcel of a lot of other things. And so that's one of the reasons why I have pressed you on what the facts are. What's behind the 2018 memo, and if you wish to say that I cannot look behind it, then you should say that in your memo as well.

MR. GOLDSMITH: Thank you, Your Honor, for giving me

that opportunity to respond to your concerns. Do you have other questions for me at this point?

THE COURT: Not at the moment.

MR. GOLDSMITH: Thank you.

THE COURT: I've been harsh enough to begin with, forgive me.

MR. GOLDSMITH: Okay.

THE COURT: Sir, if you could come forward.

MR. WASDEN: Good morning, Your Honor.

THE COURT: It's --

MR. WASDEN: Jonathan Wasden for the plaintiffs.

THE COURT: I'm sorry?

MR. WASDEN: Jonathan Wasden for the plaintiffs, Your Honor, good morning.

THE COURT: Oh, I'm sorry, I thought you were going to be Mr. Banias.

MR. WASDEN: That's Mr. Banias.

THE COURT: That's Mr. Banias. All right, then. Mr. Wasden, please, go right ahead.

MR. WASDEN: Your Honor, when it comes down to it, I know the APA, the fundamental question for the Court is, is this what Congress anticipated or envisioned happening when they created the INA, the Immigration Nationality Act, and its provisions for the H-1B visa. And looking at all of the tenets of immigration law and the Administrative Procedure Act, it's a

resounding no. This is not what Congress he intended.

A prime example of this is the agency's requirements of these employers show these specific non-speculative work assignments for the entire duration of a three year visa. Did Congress consider whether or not they had to do that? Yes, Congress did.

And discussing the employer's requirements under the labor certification or the labor condition application, Congress said employers can place an employee in a nonproductive status for lack of work as long as they continue to pay the prevailing rates that's on the LCA.

So Congress clearly anticipated that there would be times where employees would not have work to do, and the only condition they put on the employers was that they continue to pay that wage.

What the agency has done is created a rule that contradicts the statute. They haven't created it through notice of common rule-making, they've created through policy memo. And they said that you have to provide evidence of guaranteed work assignments.

And just to be clear, the guaranteed work assignment issue is different than saying you have to have a guaranteed job. In order to qualify for financial, you have to have a guaranteed job. And that guarantee is created by signing and getting certified the labor condition application. So this is not

speculative employment because they have guaranteed jobs and legally binding mechanisms to get pay if they aren't paid through the complaint driven enforcement process that DOL has now created.

So it's not a question of whether or not there is a job for them to do, the agency is contradicting the statute in 1182(n)(c)27. I got that off --

THE COURT: Did you all catch that? I hope you all wrote that down very carefully. Go ahead.

MR. WASDEN: But allows them to not have work for the employees to do all the time. So the agency's preemptive strike upon speculative employment is a problem. Not only that, but that's a rule that doesn't apply to all H-1B employers. It only applies to certain employers in a consulting role where there are employees are doing services at a client work site.

It doesn't apply to somebody who's just sitting with the employee the entire time. You can have no work to do if you have a employee sitting on the same desk the whole time not working for third parties or not doing work with clients at their location, no requirement to show any type of evidence of job assignments for your H-1B. This is only triggered if part of your business model includes placing people at a third party work site to do services for the client.

And it's company-wide. So if any single employee in your

company does work at a client work site, then all of your employees have to have guaranteed work assignments for the entire three years, which is one of the decisions we cited for Your Honor in the brief where the employee was doing an in-house project, and there was guaranteed work for two years. The agency denied the petition because there wasn't evidence of guaranteed work for the third year and says because your business model includes placing people at third party work sites, we're going to deny this, you have a higher evidentiary burden than other employees do. And that alters rights and responsibilities and obligations in order to get approval of the visa, which is by definition a legislative rule.

The other issue with the government's position is that it just denies business reality. You know, did Congress really intend for government bureaucrats to be the final arbiter of whether or not your business requires employees? Or did Congress intend for businesses to make a business decision and figure out who they want to pay to do certain work? And that's really what this boils down to. A government agency is telling employers how much work they have to do.

And as you pointed out, you know, if you're a growing business, no job is guaranteed. The only guaranteed job and guaranteed work that's out there is government employment. Everybody else has to go out and hustle, they have to make new contracts, they to be able to flex and expand. But the agency

is not allowing U.S. businesses to do that that are in this sector of the economy. They're limiting their ability to grow and bogging them down in the succession of extension petitions, paying more fees, paying additional money for attorneys all the way along, which is just absurd.

Going to the short-term approval, so in their discretion, which they can choose whether or not they can deny outright or partially deny the petition. There's no standard, no rule of reason there. By definition that grants discretion to themselves is arbitrary and capricious. There is no guiding principle involved in terms of when they will deny and when they will approve.

THE COURT: Well, wait, I thought that they denied, and your argument's about, that but they denied if they thought that there was insufficient proof of work or that there was insufficient evidence of the actual locations of work, the itinerary, or things like that.

MR. WASDEN: Yes, they do. They do deny it, but there's no real -- it says they have the discretion to approve or partially deny or outright deny the entire visa.

THE COURT: Oh, I see.

MR. WASDEN: So it's a wide spectrum of latitude that they give themselves for which there's no predictability in the system as to how an employer would determine whether or not they're going to have the visa or whether it's going to be

denied outright.

THE COURT: And do you have, when you get to the actual facts, do you have evidence that, to some degree anyway, among your plaintiffs of approximately the same kind of applications, some being approved, some being partially approved, some being completely denied?

MR. WASDEN: In fact, one of the -- one of the cases, one of the decisions that was attached with the initial brief from a company, the exact same petition, almost identical petition was submitted and was only granted a few months. They resubmitted and were given three years. So there is clearly no rationale that is predictable in the system. Another part of the APA is there to create predictability for U.S. businesses so they can make plans and they can expand and they can grow. When you lack predictability nobody invests. When you lack predictability, the economy ceases to strive. And what they've done is injected massive amounts of uncertainty into sector of the economy.

THE COURT: Okay, so now speak to the administrative law that was being argued by the government because the -- we're going to skip over the up to three years issue. You can argue that one in your briefs. But the question of whether or not the 2018 memo is interpretive building on the 2010 memo or is, in fact, legislative.

MR. WASDEN: So under the APA you've got a couple

different tests for whether or not a rule is legislative or substantive and whether or not it's interpretive.

THE COURT: Right.

MR. WASDEN: One of which is if it repudiates an existing regulation, flat out contradicts it. One is it creates new rights, obligations, responsibilities or if it contradicts a statute. So the specific non-speculative work assignment rule contradicts the statute and is therefore legislative and impermissible.

In terms of the 2018 memo, while the government says it is not binding on its employees, in fact, the adjudicative field manual, which we cite in our brief, says that any memo designated with a P or any language included in the adjudicative field manual is binding on the USCIS adjudicators and they must comply. So to say that it's not binding and then tell the employees that it is binding is a problem. You can't have it both ways.

The AFM makes clear that any adjudicator has to comply with the policy memo. And if you look at the preamble to the policy memo from 2018, it starts off with a long list of repudiated former policy members, including the itinerary requirement which it said, you know, the old memo allowed you to do a general itinerary saying, you know, they're going to be working for us for three years. That's not sufficient. Now you have to provide these contracts with exact dates and

locations for where they're going to be for the entire three years.

And again, it only applies to some employers, not H-1BY, so there's no reg or anything that actually splits these employers apart into two separate categories. If anything, the regulations specifically includes this type of business model in the proper list of employers.

So along with that, going to the employer/employee relationship, if you look at the standards of admin law, when you got multiple agencies playing in the same sandbox of the statute, if one of them has a need for consistency in application of a statutory term, and they have the expertise to properly define that, then that is the agency that the courts will determine has been given the discretion to create regulations and the authority or delegation to create regulations under the law.

So in this situation we have DOL who creates the definition of employer back in late 1990 or early 1991. And DOL goes through several rounds of notice and comment saying, hey, we're considering this new rule, this new definition of who is qualified to file for LCA and H-1B. Now there's what they call job contractors at the time. Is job contractor a business model? The question is whether or not they should have special rules applying to them or whether or not they should be treated as all other employers.

So after four or so rounds of notice and comment rule-making they publish their final rule. But prior to that they published an interim rule. And what they did is they took a pre-1990 before the H-1B category was created, there's a pre-1990 definition that was used by DOL in the H-2B logger category. And inserted into that definition the word "contractors" explicitly adopting the fact that job contractors, as DOL called them back in 1990, 1991, were proper H-1B employers. Right? It was not a secret that people were using the H-1B visa in this category.

Now, prior to 1990, DOL had no role in the H-1 or H category, they were not involved in this realm. So after 1991 Congress inserts DOL into the H-1B visa. And now if you look at 1182, that 7,000 words and change dedicated to how DOL does its role, if you look at 1184(i), it's two hundred words and change on now CIS is suppose to determine whether or not something is a specialty occupation. The lion's share of authority and guidance is given to DOL.

Now, when it comes to determining who's an employer, DOL has to know who the employer is in order to enforce the terms of the LCA. That's the most pivotal word in their authority because they can only enforce and hold liable the employer. So they've defined who the employer is. They've defined who they're going to hold liable and who they're going to come after and whose back accounts they're going to choose if you

violate the terms of the LCA and don't pay somebody. And they have that authority from Congress to do that.

CIS doesn't have any special need or expertise to define who an employer is needed in H-2B context. So in terms of which of these two agencies should be given deference, the one with the expertise, the Department of Labor, and the one with the need to have a consistent application of the term is the only agency that gets deferred to.

Which then brings up the curious question, without providing notice, the agency then inserts, copy and pasted, that same definition of employer, United States employer into its final regulation in 1991.

It's a verbatim copy of the Interim Final Rule from the Department of Labor. Including the word "contractors" which comes with it the definition of job contractors that DOL considered when drafting that language.

INS at the time, CIS's predecessor, did not display any specific confidence or regulatory expertise in crafting that language. They parroted the languages. In the case in Fogo de Chao we see that anytime a court -- or anytime an agency just parrots existing law and doesn't use their innate statutory expertise and abilities, they receive no deference.

Also in Encino Motorcars we see that if an agency fails to comply with rule-making, they don't get deference. So the agency not only failed to put it up for notice and comment this

definition, but they really don't have any specific need statutorily to be deferred to on this.

But more importantly in publishing that final rule the agency explains that the purpose of the rule is to clarify existing statutory requirements that you must have a physical presence in the United States in order to file an H-1B.

So, you know, the difference between an interpretive rule and a substantive rule, a substantive rule changes the obligations in order to get approval. A substantive rule creates authority to do something for which the statute does not already give you explicit authority to do it.

By the agency's own terms, the purpose of that definition inserted into the regs was explaining or making more crisp the statutory requirement that you must have a physical presence in the United States. The discussion in the preamble had nothing to do with what they are now applying the regulation for. This is not a question of interpretation of the regulation, this is a radical departure in application.

And as you mentioned with government counsel, you know, a rule is substantive when it repudiates an existing reg. The current rule that's being applied repudiates even the agency's definition of a United States employer if that were determined to be a legislative rule.

It repudiates the fact that job contractors who are properly considered to be employers when the regulation was

created, and it repudiates the word "or" and replaces it with an "and" in application. As we cited to in one of the briefs, one of the decisions in this case, the agency full on recognizes and acknowledges, yes, you pay their salary, yes, you hired them, yes, you provide them benefits, but that's not enough. You know, you have to show actual control essentially is what the new test is. You have to show that you are actually controlling them and they are under your thumb the whole time.

That's not what the regulation says. So they are explicitly through adjudication and policy memo rejecting the plain and clear language of the regulation, which is afoul under the APA. That is by definition a substantive rule.

I know you said you didn't want to go to the short-term partial denial issue. But it's worth noting that in 1998 the agency published a proposed rule-making rule.

THE COURT: I didn't want to go to the up to three years. The third term partial denial is slightly different.

MR. WASDEN: Okay, perfect.

THE COURT: At least I consider it slightly different because the up to three years doesn't work for me unless you have ironclad proof that they always gave three years, but apparently you don't. So anyway, go ahead.

MR. WASDEN: So in 1998, the agency publishes a notice of proposed rule-making to curb benching. At the same

time DOL had already implemented a long list of regulations in order to curb benching. And benching was the practice of if there's no work then you, you know, didn't pay the person. They just sat out on the bench and then when there was work you'd bring them back on and pay them. So DOL solved that problem. They said okay here's what you have to do. You have to pay them the wage even when they're not working and they did that through regulation.

CIS proposed going with a different model. CIS under the proposed rule-making made it basically a pre-approval process of showing that there is these guaranteed work assignments. They never finished that rule-making in 1998 because Congress passed ACWIA. And ACWIA adopted wholesale almost verbatim DOL's regs and codified it in the statute. So Congress clearly reviewed these two different ways to curb benching. And they sided with DOL and rejected INS at the time proposed rule.

INS never finished that rule and it's just floating out there as a proposed rule from 1998, which now the agency in their AO decisions, one of which we included, cites to its authoritative law for their proposition of you must have specific non-speculative work assignments for the entire duration of the H-1B visa.

So they cite to as authoritative a proposed rule that is defunct, which I don't know where that fits into the deference scheme. I've never heard of that deference to a

defunct policy memo before, but I'm pretty sure it doesn't exist, Your Honor.

So the other part to that proposed rule-making was an acknowledgment that under the pre-1990 law, the H category was primarily used by entertainers and athletes. And so they created this requirement for an itinerary pre-1990 or pre-1990 enact which required these entertainers and athletes to provide lists of gigs or competitions, you know, what track meets you're going to be going to while you're in the United States, and that justified the length of the duration.

And then they explained, you know, the current itinerary rule was created prior to the H-1B category and wasn't really relevant to the H-1B category. The H-1B category is now used for nurse staffing companies for the IT consulting industry who clearly cannot comply with the requirement because sometimes they have to place employees in a new locations with as little notice as a single day.

So the agency itself articulated in the Federal Register that the exact itinerary rule is not feasible under the H-1B category. Yet now without going through notice and common rule-making, they're trying to impose that burdensome nearly impossible standard on the industry.

But Congress in coming up with the Immigration Act of 1990, actually codified and distinguished between Os and Ps, the entertainers and athletes. And an 1184(a)(2) says, hey,

for Os and Ps, you have to provide evidence of what your guaranteed gigs are or your competitions are and CIS can, you know, reject your requested duration based on evidence of work or evidence of competitions or assignments.

That doesn't apply to H and H-1B. H-1B is governed by 1184(a)(1); 1184(a)(1) says the agency does have authority to create regulations governing such times and such conditions necessary for approval.

The agency has created some regulations to discuss time and conditions, but none of those conditions include evidence of specific work assignments. And Congress demanded that they go through notice and common rule-making. They didn't go through notice and common rule-making for this condition. This is a condition for approval that you provide guaranteed non-speculative work assignments for the entire duration of the visa, and it's not in the regs. It's not in the statute.

So Congress clearly anticipated that there would be visa categories where the agency could shorten approval periods based on evidence of work, and it did not include the H-1B visa in that for the reasons that the agency explained in their 1998 proposed rule-making, which is it's not feasible and it's impossible for this industry to comply with which goes to the -- although it doesn't -- you don't want to discuss that. It does go up to the shallow proof up to three years, which it does touch on that.

THE COURT: It touches on it, but it's from an entirely different point of view, a different perspective.

All right. Are you done?

MR. WASDEN: Unless you have any questions for me, Your Honor.

THE COURT: No, I think I'm cool, just a minute.

MR. WASDEN: What's that?

THE COURT: I said just a minute. I have a really smart brain over here.

I guess the question is before the 2018 memo when an employer applied for a labor certification of DOL and DOL issued it, did the employer thereafter also have to demonstrate its employer status to DHS?

MR. WASDEN: So DOL has definitions of who qualifies as an employer.

THE COURT: Right.

MR. WASDEN: And you have to meet their regulatory requirements and then you sign the LCA. And by signing the LCA, you are now legally liable for complying with those conditions or being hauled into the agency's administrative court system.

THE COURT: Right.

MR. WASDEN: And so as the system is designed, it's an attestation driven system, and if there's a violation it's on the back end that it's resolved.

THE COURT: Right.

MR. WASDEN: That's why Congress anticipated this working because if you wait a year to adjudicate a three year visa, you've lost a third of that visa. So Congress made it so that it was easy and quick in theory to get people into the country working, and if there's problems they've got a year after the LCA expires to sue the employer if there's a problem. So there is the mechanism for determining --

THE COURT: No, but my question to you is slightly different.

Before the 2018 memo, but after the 2010 Neufield memo, Neufeld, Neufield?

MR. WASDEN: Neufeld.

THE COURT: Neufeld memo -- what kind of evidence did an employer have to demonstrate to the agency, the DHS to verify?

MR. WASDEN: The only regulatory requirement was the exact same in both agency's regs which was they had to have an employer identification number. And they had to show that they could hire, pay, fire, or otherwise control. And that's the only evidence. So providing evidence that you're paying them, that you hired them, you have a contract with them to work, that's the evidence that was required to establish that you were an employer.

THE COURT: Okay.

MR. WASDEN: Then we go to now you have to prove actual control and guaranteed work assignments.

THE COURT: Okay, thank you. I would like to take a short break so that my court reporter can rest her fingers and then you sir, if you choose, unless you choose not to, you could respond.

MR. GOLDSMITH: Thank you, Your Honor. I will try to be brief.

THE COURT: All right. I'm just going to take about, we'll take ten minutes and I'll be back at 25 after.

(Recess at 11:15 a.m.)

(Proceedings resumed at 11:37 a.m.)

THE COURT: I've enjoyed myself much to much during this argument.

MR. GOLDSMITH: Not at all, Your Honor. Can I just ask a question about the supplemental briefing? Did you have a particular deadline when you wanted that administrative briefing?

THE COURT: Well, everybody is in some huge hurry for this. I'm sure it's very critical. If you could do your brief, I don't know what other cases you're working on. If you could do your brief in 14 days. Is that sufficient for your purposes? Then if you guys could answer in seven to ten days.

MR. WASDEN: We can do seven days, Your Honor.

THE COURT: Thank you. Okay, so --

MR. GOLDSMITH: If I could just make four quick technical points. I'm not going to repeat what we just discussed earlier.

THE COURT: Okay.

MR. GOLDSMITH: The first technical point is about the 2018 Guidance Memorandum. There was a question put forward about the agency's position. The agency's position is adjudicators have to follow the guidance memorandum. We're not disputing that. Our view is it is guidance, but it doesn't constitute legislative rule under case D.C. Circuit Preston might disagree with us, but just so we're clear on what our position is, that's our position.

THE COURT: Okay.

MR. GOLDSMITH: The second quick point is what was our position on the employment issue. It is the right to control. They have to show a right to control. It's not enough to simply hire a person and there was a case that touched on that a Fifth Circuit case, Defensor.

THE COURT: I'm sorry, can you repeat?

MR. GOLDSMITH: It's the Defensor case. It's discussed in our briefings, D-E-F-E-N-S-O-R.

THE COURT: Thank you.

MR. GOLDSMITH: The third quick point is there was a reference made to a particular subsection in 1182(n)1. The subsection is (n)(1)(g). The only reason we brought it up was

to show that by statute, Congress limited the role of the Department of Labor in reviewing the LCAs.

The language is the Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds the application is incomplete or obviously inaccurate, the Secretary shall provide the certified LCA within seven days of the date filing the application.

So the only reason we brought that up is to show that Congress, yes the Department of Labor plays an important role in the LCA process, but that review is limited.

Then if I could interject one last point that is also of a technical nature. There was an issue brought up about the notice that was provided in the 1991 rule. Whether or not it was adequate and so forth.

So putting aside the issue of statute of limitations, our view is it was a logical outgrowth of the notice that was provided that the notice talked about, had proposed in the statute on regulatory language that used the word employer, didn't include a definition of the employer drawing comments about what constitutes an employer. And to clarify they provided a definition. That's all we have to say on that.

THE COURT: I just want to tell you that we were just discussing logical outgrowth and how far that would take us so your comment is right on again. I have a question for you.

MR. GOLDSMITH: Yes, Your Honor.

THE COURT: The argument was made and I just have been trying to figure out what the agency's position is. The statute says that you have to have date and location itineraries for the entire three years, right?

MR. GOLDSMITH: I think it's the regulation you mean?

THE COURT: I don't think it's regulation.

MR. GOLDSMITH: Okay, maybe not.

THE COURT: Anyway, forgive me if I've misstated it, but where is non-speculative work assignment found?

MR. GOLDSMITH: So we don't have a rule called non-speculative work employment rule. That's something that plaintiffs refer to. Their argument was that the 2018 Guidance Memorandum was -- one of their arguments is, I'm not trying to say this is their only argument, but one of the arguments as to why it is a legislative rule.

It announced this new rule legislated by this non-speculative work assignment rule. And our position was no, it doesn't announce it and one of the examples from where we referred to it before 2018 was in the preamble to the 1998 proposed rule where we said this is our long standing practice. The practice being requiring that they actually show actual work assignments.

I think we also cited some, we cited another regulation 103.2(B) that talked about as a general matter when you apply for some type of immigration benefit, you have to show that you

meet the requirements at the time you're applying. So the reason, so your narrow question --

THE COURT: My next question though is and this is also picking up from something that was said by the plaintiffs.

If you have non-speculative employment because the employer has an obligation to pay for three years regardless to whether you're benching for some period of time or not having a job, but you're still getting paid for that three years, then you have non-speculative employment. Why do you have to have non-speculative work assignments? I mean those are different things. In employment you said in answering my question, you said work employment and then you went on and talked about assignment, but they're not the same thing.

MR. GOLDSMITH: Right, they're not and I may have misspoken. I apologize to you.

THE COURT: No, no, maybe you meant it. I don't know.

MR. GOLDSMITH: So there is a requirement just to take one step back. The H-1B program is for temporary foreign workers who are going to come and work in a specialized work.

THE COURT: Right.

MR. GOLDSMITH: So the agency has to look to determine is this person actually working in a specialized work group. So if someone is an accountant; for example, that would constitute specialized work.

THE COURT: That's how they're coming up with this new requirement.

MR. GOLDSMITH: Well, I think it's not new. I think we've cited cases.

THE COURT: Because it was in a preamble in 1998?

MR. GOLDSMITH: Not simply that. We've cited the regulation.

THE COURT: Okay.

MR. GOLDSMITH: We've cited some other authorities, but that is our position on it. And we also cited the First Circuit case, Royal Siam that says if there's statutory requirements you have to show, you have to be able to show that they meet those statutory requirements.

THE COURT: So tell me -- and this is my last question, I promise. Why these requirements itinerary and work assignments and things apply to the contracting agencies, but not to full-time employment?

MR. GOLDSMITH: So the regulations apply irrespective of whether there are consulting, IT consulting, non-IT consulting. The evidence that you would have to provide is somewhat different. Now there is a difference if the person is only going to be working at one business location. They would have to tell the agency that this is the location whereas if they're going to be placed at different places you would have to provide --

THE COURT: What if I were an employer and I was hiring somebody in for IT and my SOC, the people out there you know what I mean by a SOC and I can't come up with a word for it now. The operation center is in one location where it's cheap to keep them. The rent is lower. The main office is downtown, very expensive rent and then lots of the IT people who do internal scanning to make sure that there's nobody stealing anything, those are somewhere else. So I'm hiring somebody from outside of the country to come work in my IT department on a visa for three years. And they're going to be working in one of those three places. They're going to be doing IT support, cyber security, some penetration testing and whatever, whatever. So that's what they're going to be doing, but I don't know where they're going to be any one day. They might spend one day, might spend four hours downtown or somewhere else. Does it matter or can I just list those three locations and I'm done?

MR. GOLDSMITH: So the short answer is I don't know the answer.

THE COURT: Okay.

MR. GOLDSMITH: I can't be case specific, but there's an overriding purpose that we'd want to make sure that the individuals are in fact performing the work, the specialized work that they're being brought here to perform and you can't do a cite visit if you don't know where they're going to be

working.

THE COURT: So if I hire somebody on a contract that says you're going to be doing IT cyber security, pick that as part of IT. So you're not just sitting at a help desk. You're going to do cyber security. You're in our IT department and it might be one of a variety of places and you're coming from outside of the vendor community. And CIS says that's fine, that's okay, here's your visa.

And then in a separate part of the company, I also send some of my IT people who do answer help desk inquiries and things and I send them out to clients to help the clients with their problems, and they're sometimes with U.S. persons. Do I then have to have more than some -- how much of that then applies to the regular U.S.? I get confused between the distinctions that your client makes.

MR. GOLDSMITH: So one of the things that, distinctions they make is there was a potential and it's not just our client. It's also the Fifth Circuit in the Defensor case that there is a risk in talking about how great a risk of using third party worksites as sort of a subterfusion to defeat and overrule Congress' overall purpose; that is, people were coming, but they're not actually working in the place.

Once they come here they look for a job somewhere else. And it's just being used as a ruse to bring people into the country. That's something that animated in that sort of case

why it was a concern. And why the types of evidence you might bring might be different depending on the particular context, but the standard, the statutory standard is the same regardless. That's our position and I thank you for giving us the opportunity to address the Court and provide something worthy.

THE COURT: I do thank you for it. I thank both parties for their arguments. They have been very helpful to me because I now have a much better sense of the points that you made in your briefs that I can now pick up because as you commented in your brief for the government, there was a little disconnect between briefs, but I'm now with you all. So I thank you all. I'll be able to follow that clearly.

Yes, sir, I'm sorry.

MR. WASDEN: May I have a brief rebuttal moment?

THE COURT: A rebuttal moment. You don't mind if he has a rebuttal moment?

MR. GOLDSMITH: No.

THE COURT: And thank you, sir, for your argument. Yes.

MR. WASDEN: Your Honor, you asked where the requirement of the rule discussing the requirement to have specific, non-speculative qualifying assignments for the entire requested period of the petition was located.

In the policy memo from 2018 which is Document 15-3 page

4, that is where that language is found.

THE COURT: Okay.

MR. WASDEN: And then the agency says that they're taking this preemptive strike to prevent abuse of the system under the statutory scheme how it was created. It anticipated how to enforce abuses and it delegated to DOL an administrative court system, enforcement powers, appropriated funds for that purpose. There's nothing at all in the statute dealing with USCIS power to enforce or preemptively strike against potential abuses. More to the point, they haven't gone through rule making to create these requirements even if they did have that power. Thank you, Your Honor.

THE COURT: Okay, everybody got the last word in. Oh no, I just did. I'm so glad the Court got to speak last. Thank you all. I hope you enjoyed this as much as I did. I have to tell you that good lawyering is harder to come by than one would anticipate in federal court and you have seen some good lawyering today. Both sides knew exactly what they wanted to say and said it. So I thank you for it and now I'll go back and intelligently read your briefs. Thank you.

(Proceedings adjourned at 11:47 a.m.)

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CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

_____ _____

/s/ Crystal M. Pilgrim, RPR, FCRR Date: May 17, 2019